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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
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No. 325

ANNIE HAHR PAWLEY,

Petitioner,

v.

WILLIAM D. PAWLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No._____

ANNIE HAHR PAWLEY,

Petitioner,

v.

WILLIAM D. PAWLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled case on April 6, 1950, affirming the judgment of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (R. 524). A petition for rehearing was filed in the Supreme Court of

Florida (R. 550), and it was denied on June 9, 1950 (R. 564). Whereupon, an extraordinary petition for rehearing was filed on June 29th, 1950 (R. 565), and it was denied on July 26th, 1950 (R. 577).

OPINIONS BELOW

The final decree of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (R. 494), is unreported. The judgment or opinion of the Supreme Court of Florida is reported in 46 So. 2d 464, (Florida citation not yet available). The orders of the Supreme Court of Florida denying the petitions for rehearing (R. 577) are not yet reported.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under section 1257 (3) of 28 U.S.C.A. and under rule 38 (5) of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

When a citizen of Florida obtains an American passport, leaves his home in Florida, flies to Cuba and remains there thirty-one days and then leaves for India, but causes a Cuban firm of attorneys to file, several weeks after he left Cuba, a suit for divorce in Cuba against his wife in Florida, and no process is served upon her in accordance with the laws of the state of Florida or in accordance with the laws of Cuba, and she does not appear in the Cuban divorce case, is the

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judgment of the Cuban court granting the husband a divorce entitled to recognition under the rules of international comity and has the wife, a Florida citizen, been deprived of her marital contract and her property rights in her husband's estate by the due process of law accorded her by the fifth and fourteenth amendments to the Constitution of the United States?

STATEMENT OF THE CASE

Annie Hahr Pawley, the petitioner, was born in Georgia, and William D. Pawley, the respondent, was born in South Carolina, and both were citizens of the United States at the time the Cuban divorce was granted to the respondent. They married in Marietta, Georgia, on July 25, 1919. Four children were born to this marriage, the youngest being nine years of age at the time of the filing of the Cuban divorce suit by the respondent.

The respondent left his home in Miami Beach, where he and his wife and children resided, and established a business in China and India. He commuted between those countries and his home in Miami Beach, Florida. He accumulated a large fortune as a result of the sale and manufacture of airplanes and parts during the Chinese-Japanese war and subsequent thereto. He became dissatisfied with his home and with his wife and family and, on July 27, 1942, while the United States was in a state of war with Japan and Germany, he left them and flew to Cuba on an American passport which designated him as a citizen of the United States. At that time passports could be obtained only for purposes connected with war efforts. He obtained his passport as a result of his airplane business

in India and China. He stopped in Cuba temporarily for thirty-one days and resided there at the National Hotel, in Havana, in an attempt to give the Cuban courts the thirty day jurisdiction required by the Cuban statutes for nonresidents in divorce cases.

After sojourning at the National Hotel, in Havana, Cuba, for thirty-one days, he flew to India. Before leaving Cuba he employed a Cuban firm of attorneys to bring suit for divorce in Cuba against his wife, an American citizen residing in Miami Beach, Florida. The bill of complaint was prepared and filed after he had left Cuba for the Orient, and it was never signed nor sworn to by him and he never testified in the case, by interrogatories or otherwise. The Cuban attorneys supported the bill of complaint by the testimony of four Cuban witnesses. On the testimony of such witnesses the Cuban court granted a total divorce to the respondent but made no mention of alimony. These four witnesses resided in Havana, Cuba, and they testified that they knew of their own knowledge that Mrs. Pawley had deserted Mr. Pawley in the year 1936.

This Cuban testimony was false, because the undisputed evidence in the present case discloses that, as of January 1, 1937, William D. Pawley and Annie Hahr Pawley, together with their four children, moved into a palatial new home at Miami Beach, Florida, and the parties lived together as husband and wife from January 1, 1937, through 1941, openly and notoriously, holding themselves out as man and wife, the wife and children residing in said home and Mr. Pawley commuting between his home and India and China and making periodical trips as business required rather than permanently residing in those war-torn countries.

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In approximately six weeks after the Cuban divorce had been granted the respondent, then in India, married his secretary, who had been connected with his business in India. In 1944 the respondent brought his new wife from India and established her in a magnificent home in Miami Beach, Florida, where his former wife and children were residing, and announced the new wife to the world as Mrs. William D. Pawley. This home was maintained with great lavishness, with numerous servants, and there Mr. Pawley entertained in a very lavish style as one of America's wealthy men. During this period he was appointed Ambassador from the United States to Peru, and subsequently to Brazil, which position he occupied at the time the petitioner filed her suit in this case (R. 1). He could not have been appointed as such ambassador if he had not been an American citizen, so it is conclusive that his alleged divorce in Cuba was obtained as a nonresident, although he contended in this case that he was a citizen of Cuba at the time he obtained the Cuban divorce (R. 14).

After Mr. Pawley returned to Miami Beach, Florida, his home, and set up the elaborate establishment with his new wife, he then discontinued the club memberships of the petitioner and her charge accounts and set up the new wife as Mrs. William D. Pawley, giving her the same club memberships, charge accounts, and place in society that petitioner had previously occupied.

Although respondent was still supporting her and her four children, petitioner began negotiations for a settlement with him so that her property rights could be established definitely, but the respondent was sent to Peru as ambassador, and then to Brazil. Therefore, she did not bring suit against him for support and maintenance until

September 7, 1946 (R. 1), at which time it was necessary to obtain service by publication, due to the fact that respondent was still in Brazil.

Petitioner did not wish to fasten upon her children the stigma of a divorce and, for that reason, the suit she filed in this case was not a suit for divorce against the respondent but was a suit for alimony on grounds unconnected with divorce, as permitted by section 65.10 of the Florida Statutes, 1941.

The grounds for divorce in Florida are set forth in section 65.04 of the Florida Statutes, 1941. The statutes pertaining to alimony in the state of Florida are sections 65.07 to 65.11 inclusive. These statutes above mentioned are copied for the convenience of the court as an appendix to this petition.

In answer to petitioner's bill for alimony unconnected with causes of divorce under section 65.10 of the Florida statutes, the respondent filed an answer and counterclaim (R. 9), in which he pleaded his Cuban divorce as a complete bar to petitioner's claim for support and alimony. He contended in his counterclaim that the Cuban divorce had the effect of discharging all obligations of marriage and dissolving the contract of marriage between petitioner and said respondent.

If his contentions are correct, then petitioner, who was his wife for many years and who bore him four children, is left at his mercy, and he can support and maintain her in such manner as he pleases or he can deny her support entirely, unless she can get relief from some court. The answer and counterclaim of the respondent, William

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D. Pawley, did not seek a divorce under the laws of the state of Florida against your petitioner. It was alleged in said counterclaim that the Cuban divorce decree was absolutely valid in all respects; that it should be recognized under the rules of international comity, and that the Florida courts should enter a declaratory judgment declaring that the bonds of matrimony existing between your petitioner and the respondent under the laws of the State of Florida had been dissolved by the alleged Cuban divorce. Said counterclaim requested that petitioner be enjoined from ever challenging the validity of the Cuban divorce. He sought to bar her from ever attacking the Cuban divorce or from ever attempting to obtain an order from any court requiring him to pay alimony to petitioner.

To the counterclaim of the respondent petitioner filed an answer (R. 23), and in this answer she alleged that the divorce entered in the Republic of Cuba was not binding on her in any respect; that the claim of the respondent that Cuba was his matrimonial domicile was untrue; that the matrimonial domicile of the plaintiff and the defendant was Miami Beach, Florida, and that the claim of the respondent that he was domiciled in Cuba was a pure sham and fiction.

Thereafter petitioner filed a motion (R. 44), for leave to amend her bill of complaint for the purpose of showing that the Cuban divorce is a nullity; that it is not entitled to the full faith and credit protection of the Constitution of the United States of America, and that it was not procured under such circumstances as to be entitled to recognition under the doctrine of international comity (R. 46). This proposed amendment was based on section 65.09 of the Florida Statutes copied in the appendix to this peti-

tion. The trial court denied plaintiff the privilege of filing this amended bill (R. 54).

Testimony was taken before a special master (R. 75), and he filed his report sustaining the Cuban divorce on the ground that it should be recognized as a severance of all matrimonial ties under the rules of international comity and given full force and effect (R. 57). Exceptions (R. 67) to the special master's report were filed, and these were argued before the trial court and were overruled (R. 72). A final decree (R. 494) was then entered by the trial court denying the petitioner the rights which she sought and dismissing her bill of complaint (R. 494) and enjoining her from challenging the validity of the Cuban divorce. The effect of this final decree is to leave petitioner without her contractual matrimonial rights and to give her husband a divorce, and to deprive her of her dower rights allowed under the statutes of the State of Florida, which dower rights are one third of the real estate of a husband which he owns at the time of his death or which he has before conveyed and in which she has not released her dower prior to his death, and one third of his personal property owned at the time of his death, all free of the debts of the husband and subject only to her proportionate share of the estate and inheritance taxes. Section 731.34 Florida Statutes, 1941. (A copy of this statute is included in the appendix hereto.)

An appeal (R. 515) to the Supreme Court of Florida was filed, and the assignments of error thereon (R. 516) attacked the validity of the final decree and other orders of the trial court.

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With one of the justices and the chief justice dissenting, the Supreme Court of Florida affirmed the final decree of the trial court insofar as it dismissed petitioner's bill of complaint and her cause of action. The Supreme Court of Florida then stated:

> "That portion of the final decree which held the Cuban divorce to be valid in all respects and which enjoined the appellant, her agents, representatives, attorneys, servants and employees from attacking the same and challenging the validity thereof is reversed with directions that the final decree be modified in such manner as to provide that the Cuban decree of divorce be recognized in this jurisdiction as a valid severance of the bond of matrimony — a dissolution of the marital status — in that it annulled and cancelled the mutual obligation of consortium but that it does not constitute a bar to appellant's right to alimony and to this extent only the decree should be recognized in the State of Florida and by the courts thereof under the rule of comity."

Pawley v. Pawley, 46 So. 2d 464, 475.

Petitioner is thus permitted to file another suit for alimony, but her contract of marriage is annulled and her inchoate dower rights destroyed without due process of law.

SPECIFICATIONS OF ERRORS

1. The Supreme Court of Florida, in affirming the final decree (R. 524) of the lower court holding that the

Cuban decree of divorce was entitled to recognition under the rules of international comity, erred because the Cuban decree is not based on the due process of law accorded to petitioner by the fifth and fourteenth amendments to the Constitution of the United States. Thus the state court has decided a federal question of substance, affecting all citizens of the United States, not heretofore determined by the Supreme Court of the United States, by holding in effect that, under the rules of international comity, a decision of a court of a foreign nation, not based on due process of law, is entitled to full faith and credit.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of Florida, so that the errors complained of may be reviewed and corrected.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The question raised in this case has never been settled by the Supreme Court of the United States. It is of importance to every home in the United States and is, therefore, a question of public interest. If an American citizen is to be permitted to leave his home, go to a foreign country, sojourn there for thirty-one (31) days in a hotel then leave for a foreign country and several weeks afterward while in said foreign land, have counsel file a bill for divorce on a ground not recognized by the laws of Florida where petitioner and respondent resided, and obtain it under the laws of that country pertaining to nonresidents on false testimony of witnesses of that foreign country and on no personal testimony of respondent by depositions or otherwise, and thus break the contractual matrimonial rights of the wife and deprive her of all her statutory rights under the laws of her state, and then have such decree of divorce protected under the rules of international comity, no home in America is safe. Therefore, this question is one that involves the violation of the public policy of the state of Florida and other principles, the settlement of which is important to the general public.

The Supreme Court of the United States has held that where it appears from the record that

> "principles the settlement of which is important to the public as distinguished from that of the parties"

are involved, the writ of certiorari will be granted.

Layne & Bowler Corp. v. Western Well Works Co. Inc., 261 U.S. 387, 393, 67 L. ed. 712, 714.

In order to present a factual background for the application of the law of comity, we wish to direct the attention of the Court to certain important facts found in the record.

Mr. Pawley, the respondent, was born in Florence, South Carolina, in 1896. Shortly thereafter his family moved to Cuba, where he spent his boyhood. He never gave up his United States citizenship. While he was in his teens he moved with his parents to Port au Prince, Haiti.

After he moved to Haiti there is no evidence that he ever returned to Cuba or visited that country for nearly fifteen years. While residing in Haiti he married Annie Hahr Dobbs, of Marietta, Georgia, on July 25, 1919 (R. 75), and they went on their honeymoon to New York. Then they took passage to Port au Prince, Haiti, where they made their home (R. 76) until 1923. They then returned to Marietta, Georgia, where they lived with Mrs. Pawley's parents, and he obtained a position with Nunnally Candy Company in Atlanta. Shortly thereafter he gave up that position and moved his family to Wilmington, Delaware (R. 76). In 1925 he moved his wife and baby to Miami, where he participated in the real estate boom. He first established his residence at the Granada Apartments in Miami, where his second child, a son, was born (R. 77). In September, 1926, he moved his family into a home at 4210 S. W. 4th Street, Miami, Florida, where they resided until 1929 (R. 77) and where their third child was born.

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Like many others in Miami, he lost everything as a result of the deflation following the boom, and it was necessary for him to seek a position elsewhere. As he spoke Spanish fluently, he succeeded in obtaining a position with Pan American Airways, to aid in the acquisition of certain landing rights in Cuba. Thus, after an absence from Cuba, his boyhood home, of approximately fifteen years, he returned as an employee of an American company and remained there, as an American citizen, from November 19, 1929, to November 11, 1932, approximately three years. While there he took charge of the Cuban National Airways, which was taken over in 1932 by the American Airways, and Mr. Pawley was again without a job. His same employer offered him a temporary job in China (R. 220).

As soon as he found himself without occupation in Cuba, be brought his family back to Miami Beach, Florida, where he testified that he would rather live than anywhere in the world (R. 237). He rented a home at 2800 Prairie Avenue, Miami Beach, and there left his family, then consisting of his wife and three children. His wife was pregnant at that time with his fourth and last child, which was born several months after he left for China. Mrs. Pawley testified that Mr. Pawley did not want her to go to China with him because she was pregnant (R. 80); that Mr. Pawley told her that, if she would not go to a hospital and have an abortion, she could not go to China with him (R. 119). He denied this, and said that he did not ask her to go to China at that time because he did not know anything about conditions out there.

Anyway, he went on to China in November, 1932, and left his wife and family in a rented home in Miami Beach, Florida. Her fourth and last child was born there, on June

13, 1933 (R. 80). Mr. Pawley made his connections in China and returned to Miami on a visit just prior to the birth of this fourth child. When the child was a week old he told Mrs. Pawley he was going back to China, and then he went to New York (R. 80). He telephoned Mrs. Pawley from New York that he was going to China and said that he would not take the baby, and she said she would not desert her baby (R. 80). He then agreed that she could take the baby, but the other three children were left in charge of her mother at Miami Beach, in the home they had rented.

Mrs. Pawley made three or four trips to China with Mr. Pawley and stayed with him practically a year one time, but the family home was always maintained at Miami Beach, Florida, and both of the parties returned there on each occasion after they left China (R. 226).

Mr. Pawley contended in his answer that his wife had refused to go to China with him, but there is no supporting testimony in the record of such a statement. In the summer of 1936, after Mrs. Pawley had been in China for some time, she returned to the United States by way of England. She arrived in Miami in August, 1936. Mr. Pawley contended in his pleadings that he made arrangements for moving his family to China, but he has not so testified.

After they had lived at Miami Beach in a rented house in 1932, Mr. Pawley, on returning to Miami Beach from one of his foreign trips, purchased a permanent home at 3401 Prairie Avenue. This was purchased just before Mrs. Pawley left for the hospital for the birth of her fourth child (R. 81). The title was taken in their joint names. From 1934 through the summer of 1936 this home was the family home (R. 227).

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When Mr. Pawley reached Miami Beach in the fall of 1936 he purchased a house at 3190 Pinetree Drive, Miami Beach, paying $63,000 cash for the house and spending more than $20,000 in improving it in the year 1937. This house was purchased in the latter part of December, 1936, but the family, including Mr. Pawley, spent Christmas of that year at the home at 3401 Prairie Avenue. Then, about the first of 1937, the family moved into the new home at 3190 Pinetree Drive, Miami Beach. This home was also purchased in the joint names of the husband and wife (R. 84-85).

The children were in school at Miami Beach (R. 86), and Mr. Pawley and all his family were citizens of Dade County, Florida. They had no other home, and Mrs. Pawley testified that Mr. Pawley never paid any special tuition for his children to attend school, as required of non-residents (R. 86). He testified that she never went back to Hongkong or China after the Japanese had forced Mr. Pawley and others to evacuate Shanghai, in the latter part of 1936 or early part of 1937 (R. 87).

The record further shows that after 1937 Mr. and Mrs. Pawley continued to live, through 1939, together as husband and wife at 3190 Pinetree Drive. Mr. Pawley was home quite often, and Mrs. Pawley testified that she and her husband lived together and cohabited as husband and wife at 3190 Pinetree Drive through those years; that this was their home; that he held it out to be their home; that he invited his friends there and entertained them, and, although he went away on trips, he always returned there and lived with his family. He went to Brazil in 1940, after he had been sick a long time at the Pinetree Drive home, and Mrs. Pawley and the family nursed him and cared for him (R. 93-94-95).

About that time Mr. Pawley decided to establish a third and more elaborate home on one of the exclusive islands just off Miami Beach, known as Sunset Islands. He constructed this great home, which is estimated to have a value of approximately $200,000, the petitioner helping him to design this home, and it was intended that the family would move into that new home as soon as it was completed. Evidently a breach was occurring in the marital relations in 1940, for Mr. Pawley put the title to this home on Sunset Islands in one of his corporations, and then he moved out of the home at 3190 Pinetree Drive without ever inviting Mrs. Pawley or the children to move with him (R. 94).

In the meantime he acquired large interests in Miami. He had formed the Intercontinent Aircraft Corporation and had constructed large buildings; he purchased the Miami Beach Railway Company, which is the transportation system for the city of Miami Beach and parts of Miami; he had a company known as Pan American Lumber Company, which dealt in building supplies (R. 102, 125).

The record shows that, while Mr. Pawley was living in Miami Beach in 1942, he approached Mr. Herbert Dobbs, a brother of the petitioner (R. 106-107), to seek his help in obtaining a divorce and settlement with his wife by amicable means; that he never mentioned to Mr. Dobbs that he claimed to be a resident of Cuba in the years 1935 to 1943; that, after the conference with Mr. Dobbs in 1942, Mr. Pawley went to Cuba through Pan American channels, and that, when Mr. Pawley left Miami in the late spring of 1942, as alleged in his answer, to go to Cuba, he would have had to have gone on a passport issued by the United States government (R. 111).

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Mr. Pawley had no home for himself and his family except Miami Beach, Florida, and, like a homing pigeon, he always came back whenever he could get away from his business in the Far East. He was in China, making many millions of dollars out of his airplane business, but he maintained his home at Miami Beach. He testified that "of all the places I have ever been in my life I would rather live in Miami or Miami Beach than any place in the world." (R. 237)

Traveling on an American passport and using his India war business as an excuse, Mr. Pawley went to Cuba for the sole purpose of obtaining a divorce and not with the intention of making it his domicile or of permanently residing there. He arrived there about July 27, 1942, left on the 27th or 28th of August, 1942 (R. 261-262); so he was in Cuba only thirty-one days on a leave of absence from his American employer and on an American passport. When he left Cuba he went to India on the American passport (R. 279, 420). About thirty days later a Cuban lawyer filed in Cuba a complaint for divorce for Mr. Pawley, charging desertion or separation for six months and asking for a divorce on that ground (R. 255).

THE CUBAN DIVORCE DECREE

Under the Cuban Law (R. 601) a foreigner applying for a divorce, where the marriage ceremony *was not performed in Cuba* and the parties are not actual residents of Cuba, may obtain a divorce only on two grounds, (1) mutual acknowledgment of incompatability, or (2) on causes that occurred subsequently to establishment in Cuba of the domicile of either of the spouses,

"unless the laws to which the spouses are subject in their own country provide that such causes shall have like effects."

(See article 54, Cuban Divorce Laws, marked "Defendant's Exhibit 8," R 601.)

Said article 54 reads as follows:

"Divorce of foreigners whose marriage was not solemnized in Cuba.

"Article 54. Cuban Judges and Courts shall also try divorce suits of foreigners who married outside of Cuba, applying to them the provisions of this Decree-Law, provided that the divorce is based on mutual acknowledgment of incompatibility or on causes that occurred subsequently to the establishment in Cuba of the domicile of either of the spouses, unless the laws to which the spouses are subject in their own country provide that such causes shall have like effects."

Article 3 of the Cuban Divorce Laws also permits divorces between foreigners, and the Cuban decree shows that paragraph 13 of article 3 is the ground used by Mr. Pawley. It reads as follows:

"Separation of the spouses for more than six months, because of rupture of their conjugal life in common, or because either of them refuses to continue it."

Mr. Pawley attached to his answer a copy in Spanish

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of his Cuban divorce decree. A translation of it is shown in the exhibit marked "Translation of Certain Pleadings in Cuban Divorce Action" (R. 578). *In this decree the Cuban court recites that Mr. Pawley and his wife are citizens of the United States.* By reason of this recital in the Cuban divorce decree, Mr. Pawley could not obtain his divorce under article 54 above quoted, but he had to rely exclusively on paragraph 13 of article 3, reading:

> "Separation of the spouses for more than six months, because of rupture of their conjugal life in common, or because either of them refuses to continue it."

This is not a ground for divorce in Florida.

Florida statutes provide that there must be wilful, obstinate, and continuous desertion for a least one year. F.S.A. 65.04(7). Mr. Pawley could not obtain a divorce in Cuba against a resident of Florida on grounds not recognized in Florida and expect the courts of Florida to recognize it under the doctrine of comity.

The very fact that Mr. Pawley obtained a leave of absence, went to Cuba on an American passport as an American citizen, and remained there for only thirty-one days, shows that he never intended to make Cuba his residence or home, and his sworn statement (R. 13) that he had abandoned his Florida domicile and "acquired a new one in Cuba and has never relinquished it" must be regarded as false and fraudulent and should not be made the basis of a decree which has for its effect the taking from his wife her dower rights without due process of law.

In the case of PARKER v. PARKER, decided in 1945, the Supreme Court of Florida refused to approve a Cuban divorce because of fraud.

> "Good faith and due process is the very bedrock on which our system of jurisprudence is constructed. Not one semblance of that was observed in procuring the Cuban divorce."
>
> **Parker v. Parker,** 155 Fla. 635, 21 So. 2d 141.

Transient divorces are not recognized by the Supreme Court of Florida:

> "The taking up of abode in Florida for sole purpose of prosecuting a divorce suit is not the establishment of a *bona fide* 'residence' in Florida since there must be coupled with the sojourn in the state the intent to make the state the legal residence of the plaintiff."
>
> **Phillips v. Phillips,** 146 Fla. 311, 1 So. 2d 186, 187.

That Mr. Pawley was only a transient in Cuba seeking a divorce is shown by his own testimony, in which he said:

> "So I telephoned Tom Morgan, my boss in New York, and told him that I was going to stay in Cuba for thirty-five or forty days, which I did, and at the end of the period which was necessary to establish a residence, and I kept daily in contact with the Cuban legal authorities, the divorce proceeding was filed." (R. 238)

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Transient divorces in Florida are not in favor with courts outside of Florida.

> "The proof before the Court clearly established that decedent never was domiciled in Florida. He did not even reside there for the statutory period. He was present in New York during part of the time required for residence in Florida. His alleged residence was a sham and fraud. He went to Florida for the sole purpose of taking advantage of its divorce laws. He retained his position in New York University. He returned to it. He cashed his salary checks here. He supervised his classes and after his remarriage in Maryland returned here and continued his domicile and residence here. All of these facts conclusively demonstrate that decedent did not acquire a *bona fide* residence in Florida and that he went there merely for the purpose of procuring a divorce.
>
> "In such a situation this Court is not required to give recognition to the decree of divorce. Matter of Bingham, supra; Bell v. Bell, supra; Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A.L.R. 1357."
>
> **In Re. Lindgren's Estate,** 43 N.Y.S. 2d 154, 155.

The Cuban decree above mentioned recites that the Cuban courts will take cognizance of divorce suits of foreigners

> "who have contracted marriage outside of Cuba, applying the provisions of the Law on the subject, provided the divorce is based, among other causes, on some cause or ground that the national law of the spouses regards as grounds for divorce." (R. 583)

and that an affidavit was submitted to the Cuban court with the bill of complaint to the effect that the laws of Florida,

> "the place of residence of the parties, admit the voluntary, obstinate and continued desertion of the plaintiff by the defendant during one year as grounds for divorce, which are equivalent to those established in paragraph thirteen of Article 3 of our Divorce Law." (R. 583)

This paragraph 13 of article 3 of the Cuban Divorce Laws pertains to the "separation of the spouses for more than six months because of rupture of their conjugal life in common, or because either of them refuses to continue it." (R. 589)

Thus the Cuban decree itself shows that the ground of divorce is based on a false affidavit, submitted to the Cuban court with the Cuban bill of complaint, to the effect that the Florida divorce law requiring wilful desertion of twelve months is equivalent to the Cuban requirement of separation for more than six months. The fraud is apparent on the face of the Cuban decree and, under the Parker case above mentioned, is lacking in one of the essential elements of jurisdiction and should not be recognized as valid and binding on the parties.

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No home in America would be safe from surprise attacks like this if such a fraudulent decree is held valid. The very recitals of said Cuban decree, when read in connection with the Cuban laws, show that a fraud was perpetrated on the Cuban courts. The Cuban decree by its recitals shows that Mr. Pawley was domiciled in the United States and not in Cuba, as he falsely swore in his answer in the present case (R. 579). Nor was he a resident of Cuba within the meaning of our law when he flew down there on an American passport specifically to get a divorce and then went on to India to marry his secretary. Mr. Pawley never even returned to Cuba to testify in the divorce case, nor did he give testimony by interrogatories or in any manner in the case. He relied wholly on the testimony of *four Cuban witnesses*, who testified by *signing an affidavit* in which they swore to matters of which they could not possibly have had knowledge (R. 280). These four witnesses who signed the affidavit simply stated the following, and nothing else:

> "It is true that Mrs. Pawley, that is, Mrs. Annie Hahr Dobbs Pawley, also refused to go to China and live permanently with her husband, preferring to maintain her residence in the United States of America.
>
> "It is true that since 1936, the spouses, William D. Pawley and Annie Hahr Dobbs Pawley, were living apart and there was not existing between them conjugal relations as of normal matrimonies." (R. 47)

This affidavit is the only testimony introduced in the Cuban case, and this testimony of these four Cuban wit-

nesses, procured by Mr. Pawley or someone in his behalf, is totally false. Mr. Pawley on cross-examination in the present case admitted that he and petitioner never discussed their marital affairs in the presence of these four witness (R. 280). On this false testimony the Cuban decree recited that:

> "since 1936, when Mrs. Annie Hahr Dobbs Pawley definitely refused to join her husband, the two spouses have lived apart, without a renewal of their marital life, the husband having found himself compelled to make frequent trips to the United States of America to see his children." (R. 580).

So the Cuban decree perpetuates the falsehood of separation in 1936 — the only ground of the Cuban divorce.

This testimony and recitals in the decree are shown to be false by Mr. Pawley's own testimony (R. 280). He testified that in 1937 he was still trying to separate his wife from the influences which he claimed were destroying the marriage. Mr. Pawley and Mrs. Pawley were living together as husband and wife as late as September 30, 1937 (R. 285). He bought the home at 3190 Pinetree Drive, Miami Beach, in December, 1936; and had it redesigned in the early part of 1937. Through the winter and spring of 1937 he entertained his friends there and presided over his great mansion as its master, with all the pomp and glory that his immense wealth permitted. Letters show that he would be *home* again soon and that he wished that Mrs. Pawley could have been with him in Budapest. In August, 1937, Mr. Pawley sent to Mrs. Pawley at their

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home from Italy a postcard with the following message on it:

> "Mrs. William D. Pawley, 3190 Pine Tree Drive, Miami Beach, Fla., U.S.A. We came here by plane from Milan — left Bad Nauheim yesterday by train. The minister leaves for China tomorrow. Sellett and I will see him off. We then go back to Athens, then Budapest, Vienna, Paris, London & home. The business is ok. Can't wait to see you. Love, Cuba." (R. 136)

On September 30, 1937, Mr. Pawley wrote a letter from London to Mrs. Pawley, in which he assured her that he was going to give up his job and try to make a "go of their married life" (R. 285).

This evidence shows conclusively that the four Cuban witnesses swore falsely and caused the Cuban court to perpetuate a fraud on petitioner, as it recites that Mr. and Mrs. Pawley had been living apart since 1936 without renewal of their marital life. So the Cuban decree, obtained by false testimony, is such a fraud as to bring this case squarely within the Parker case, supra.

When this case reached the Supreme Court of Florida, expediency and a desire to protect a wealthy influential man becomes evident, as is indicated by the theory of a divisible divorce, the basis on which the majority opinion (Pawley v. Pawley, 46 So. 2d 464) upholds the Cuban divorce decree, contrary to all law on international comity and in violation of former opinions of the Supreme Court of Florida.

In this majority opinion, the Supreme Court of Florida stated that the Florida statutes recognize "divisible divorces" and stated that they are based on the eighth ground of divorce specified in the Florida statutes, reading as follows:

> "(8) That the defendant has obtained a divorce from the complainant in any other state or country."
>
> F.S.A. 65.04.

In a minority opinion by Justice Terrell, he says that the law requires ninety days' bona fide residence before one can apply for a divorce, but, under the majority opinion of the Supreme Court of Florida on this case, a person can abide in Cuba for thirty-one days, secure a divorce without notice to his wife, and proceed home with his new model and

> "bid the old model to vamoose, nothwithstanding she still claims her citizenship here and he says he is a citizen of Cuba. *If this constitutes due process, accords justice to a citizen of this country and spells out equal protection,* then I confess I have been wrongly tutored as to these concepts."

After this timely and pertinent comment, Justice Terrell points out why the case of ESTIN v. ESTIN, 334 U.S. 451, 92 L. ed 1561, relied on by the majority of the court for the theory of divisible divorces, does not apply and that there is no such thing as a "divisible divorce" under the statutes of Florida.

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"In the case at bar Mrs. Pawley is attempting to acquire rights secured to her under Section 65.10, Florida Statutes 1941, F.S.A. Mr. Pawley seeks to defeat her claim with a foreign divorce decree. This is quite different from an attempt to overthrow a right previously granted by a court of competent jurisdiction as was done in the Estin case. Section 65.04, Florida Statutes 1941, F.S.A., is also relied on to support the 'divisible divorce' theory. The gist of this statute is to create a ground for divorce where the defendant has secured a divorce from the complainant in another state or country. I can see no analogy whatever between such a ground for divorce and the 'divisible divorce.' Mrs. Pawley is not seeking a divorce, she is seeking alimony or support while defendant is trying to establish the validity of his Cuban divorce to defeat her claim. The concept of 'divisible divorce' is not remotely concerned, and so far as the record shows, neither party attempted to bring Section 65.04 into the picture.

"The question of 'divisible divorce' was not before the chancellor. He disposed of the case on the theory that the Cuban divorce could be given full force and effect in this State on the ground of judicial comity. I know of nothing more fundamental in the law of this country than that one is entitled to have his case tried and disposed of in the appellate court on the same theory that it was disposed of in the trial court. It is equally fundamental that this Court will not adjudicate questions that were not before the

trial court, yet it conclusively appears that both these fundamental concepts were set at naught by the majority opinion.

"Another reason that no such concept as 'divisible divorce' should be recognized in Florida, is, that the metes and bounds of the divorce law are defined by statute, and when this is the case, it is not for courts to enlarge, reduce, or vary the written law in the application of any speculative theory that they may have. It is the duty of courts to construe and declare the law as the legislature pronounces it. When we atempt to construct or add to it, we are no more than meddlers. The law of Florida, Section 65.03, Florida Statutes 1941, F.S.A., recognizes absolute (a vinculo) divorce only. Some states recognize two kinds of divorce, absolute divorce and divorce from bed and board (a mensa et thoro). I have been unable to find any other kind discussed by the text-writers or the case books. The law of this state certainly excludes any other kind, yet the majority opinion rushes in where the legislature has not seen fit to tread and creates a new species of divorce."

Pawley v. Pawley, 46 So. (2d) 464, 476.

CONCLUSION

So it appears on the face of the record that:

(1) Respondent in his action for divorce in the Cuban court was neither domiciled in nor a resident of Cuba at the time he filed in that court his action for divorce.

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(2) Petitioner, the defendant in the action instituted in Cuba by respondent, was neither domiciled nor residing in Cuba at the time of the filing of said action for divorce in Cuba.

(3) Petitioner was never served with process to appear in said action filed in the Cuban Court and she did not file any appearance in said cause.

(4) The ground for divorce on which said Cuban court entered its decree dissolving the bonds of matrimony between petitioner and respondent was not a ground for divorce under the laws of the State of Florida, where petitioner was domiciled and residing before, at the time of, and subsequent to the time of the filing of said action in the Cuban court.

(5) The decree of divorce entered by the Cuban court was based on perjured testimony which caused said court to commit a fraud on petitioner through the divesting of her rights guaranteed by the laws and Constitution of the State of Florida and of the United States.

It further appears on the face of the record that when respondent filed his counterclaim to petitioner's action for alimony and set up as a bar to said action for alimony the decree of the Cuban court, dissolving the bonds of matrimony between petitioner and respondent, petitioner in her answer to said counterclaim denied:

(1) That respondent was domiciled in or a resident of Cuba at the time of the filing by him of the action for divorce between him and petitioner.

(2) That petitioner was either domiciled or residing in Cuba at the time of the filing of said divorce action.

(3) That petitioner was served with process to appear in said divorce action or that she ever filed an appearance in said action.

(4) That the ground for divorce on which said Cuban court entered its decree dissolving the bonds of matrimony between petitioner and respondent was a ground of divorce under the laws of the state of Florida, where petitioner was domiciled and residing before, at the time of, and subsequent to the time of the filing of said action in the Cuban court.

(5) The truth of the testimony of the witnesses upon which the Cuban decree of divorce was entered.

It further appears on the face of the record that the master in chancery appointed by the Circuit Court of Dade County, Florida, to take testimony on the issues in the cause and make his findings of law and fact never made any findings on the aforesaid issues but merely found that respondent had been legally divorced from petitioner by the decree entered in the Cuban action instituted by respondent against petitioner.

It further appears on the face of the record that the final decree entered by the chancellor in the action instituted in the Circuit Court of Dade County, Florida, by petitioner against respondent, in which respondent filed said counterclaim pleading as a bar to petitioner's action for alimony his decree of divorce entered in the Cuban court, did not adjudicate the aforesaid issues but held

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that the Cuban decree of divorce was a valid and binding decree and was entitled to be enforced in the state of Florida under the law of comity.

It further appears on the face of the record that, on appeal of the decree so entered by said Circuit Court to the Supreme Court of Florida, said Supreme court did not find that the aforesaid issues had been adjudicated by the lower court and affirm any finding in respect thereto, nor did it by its independent judgment adjudge said issues adversely to petitioner, but it did hold that under the law of comity the Cuban decree of divorce should be recognized as a valid decree severing the ties of matrimony between petitioner and respondent with the right in petitioner to file her action against respondent for alimony, upon the theory of a divisible divorce, rightly applied in the case of ESTIN v. ESTIN, supra, but erroneously applied by it to the issues made by the record.

The questions to be decided are: (1) Was the Cuban decree, under the aforesaid facts appearing on the face of the record, entitled to recognition under the law of comity as a valid and binding decree of divorce in the state of Florida, where jurisdiction in suits for divorce is based on allegations and proof of three things: (a) domicile or residence of one of the parties in the state of Florida; (b) one of the nine grounds of divorce enumerated in the statute; (c) service of process on or the appearance of the defendant, and (2) Is there such a thing as a divisible divorce under the Statutes of Florida and the decisions of the Supreme Court of Florida, notwithstanding the case of ESTIN v. ESTIN, 334 U.S. 541?

In the cases of HILTON v. GUYOT, 159 U.S. 113,

40 L. ed 95, and HERRON v. PASSAILAIGUE, 92 Fla. 818, 110 So. 539, both the Supreme Court of the United States and the Supreme Court of Florida defined comity as neither a matter of absolute obligation nor of mere courtesy and good will, but the recognition which one nation allows within its territory to the legislative, executive, or *judicial acts of another nation*, having due regard both to international duty and convenience and to the *rights of its own citizens.*

And in the case of HADDOCK v. HADDOCK, 201 U.S. 587, 606, 50 L. ed 877, 886, the Supreme Court of the United States went so far as to say that it did not question the power of the State of Connecticut to enforce within its own borders the decree of divorce granted by the courts of that state where it had jurisdiction only of the plaintiff, and that it did not doubt the power of the State of New York to give a decree of that character rendered in Connecticut, within the boundaries of the State of New York and to its own citizens, such efficacy as it might be entitled to, *provided it was in keeping with the public policy of that state.*

In other words, judicial opinions based upon comity, while appearing to be circumscribed only by what courtesy and good will may dictate, are nevertheless limited, where individuals are involved, *by the rights of the citizens and the public policy of the state.* Whether by comity the Cuban divorce should have been adjudicated as valid and binding on a citizen of Florida, requires a determination of the rights of petitioner, as such a citizen, in an action of divorce by which the bonds of matrimony between her and respondent, her husband, were sought to be dissolved and her dower rights canceled. It also requires a determ-

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ination of what is meant by or what is included in the public policy of a state.

The courts have universally held that the public policy of a state or nation is to be found in the *Constitution*, the *statutes*, and in *judicial decisions of the supreme court of a state*. The statutory and constitutional rights of the citizens of a state, as found in the provisions of these laws and the construction given them by the supreme court of that state through the years, are what formulate the public policy of a state. So, when we examine the rights so acquired by petitioner, we are led to the conclusion that the decrees of the circuit court and the judgment of the Supreme Court of Florida in recognizing the validity of the decree of divorce entered in the Cuban court dissolving the marriage relation between petitioner and respondent was in violation of the public policy of the state of Florida. It denies to petitioner due process of law and it is not founded upon comity, as defined both by the Supreme Court of the United States, the Supreme Court of the State of Florida, and the courts of this country in general.

St. Louis Mining & Mill Co. v. Montana Mining Co., 171 U. S. 650, 655, 43 L. ed 320.

Colgrove v. Lowe, 175 N. E. 569, 570; 343 Ill. 360.

Moscow Fire Insurance Company of Moscow, Russia v. Bank of New York and Trust Company, 294 N. Y. S. 648, 672.

Mertz v. Mertz, 271 N. Y. 466, 3 N. E. 2d 597.

Herron v. Passailaigue, supra.

The Supreme Court of the United States has stated that in determining the question of what is the public policy of a state and what is contrary to it, the court cannot look at general consideration of the supposed public interest and policy of a state beyond what its constitution and laws and judicial decisions make known. The court is not at liberty to travel outside of the record in order to ascertain what is against public policy of a state or what is within the public policy of a state. It is not the varying opinion of laymen, lawyers, or judges as to the demands or interests of the public.

Vidal v. Girard's Executors, 43 U. S. (2 How.) 127, 197, 11 L. ed 205.

Hartford Fire Insurance Company v. Chicago, Minneapolis & St. Paul Railroad Company, 70 Fed. 201, 202.

Some courts state that courts have no authority to enforce laws of foreign nations which are contrary to the public policy of the states as defined within the constitution, its laws, and its judicial decisions.

United States v. Bank of New York and Trust Co., D.P.N.Y., 10 Fed. Supp. 269, 271.

In the case of GOULD v. GOULD, 235 N.Y. 14, 138 N. E. 490, the Court of Appeals of New York held that it was prohibited from recognizing the foreign decree in conformity to the principles of comity if such decree offended the public policy of New York and in view of the fact that the *judgment of the absolute divorce then before the court was granted for a cause not recognized as suf-*

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ficient in the State of New York, the State of New York could not validate such decree on the ground of comity because it was contrary to the public policy of the state.

In the case of HADDOCK v. HADDOCK, supra, 50 L. ed. 881, reference is made to the case of Cox v. Cox, 19 Ohio St. 502. The question there was whether an ex parte decree dissolving the marriage relation could defeat the rights of the wife granted to her under the statute. The Ohio court held that:

> "To give to a decree thus obtained the effect claimed for it would be to allow it to work a *fraud upon the pecuniary rights of the wife.* Such a result, in our opinion, is rendered necessary by *no principle of comity or public policy*, the only grounds upon which ex parte decrees of divorce are authorized and supported." (Emphasis ours)
>
> **Haddock v. Haddock**, supra.

Again in the same case the same court referred to the case of DOERR v. FORSYTHE, 50 Ohio St. 726, 35 N. E. 1055, in which it was held that an Indiana divorce granted to a husband upon *constructive service* was held not to bar the *right of a wife to dower in lands in Ohio* during coverture by the husband.

In the case of WILLIAMS v. STATE OF NORTH CAROLINA, 317 U.S. 287, 87 L. ed 279; 325 U.S. 226, 89 L. ed. 1577, the Supreme Court of the United States held that the domicile or residence of the plaintiff in the state of the forum is essential to give the court jurisdiction and that a foreign decree of divorce obtained without

domicile in the divorce forum will not be given recognition in another state, even under the rules of international comity.

It is generally held throughout the United States that, if the full faith and credit provision does not apply to judgments and decrees of foreign countries, the only basis upon which recognition may be extended to foreign decrees of divorce is the rule of international comity, but here too the well settled principle is that, unless the foreign court had jurisdiction over the subject matter of the divorce by reason of the bona fide residence or domicile there of at least one of the parties thereto, its decree of divorce will not, under the rules of comity, be recognized in one of the states of the United State; and this, it seems, although the laws of such foreign country do not make residence or domicile a condition of its courts' jurisdiction.

If such be true, let us examine the laws and decisions of the state of Florida under which petitioner claims substantive rights have been taken from her without due process of law.

The right of the wife to dower is not derived through the husband, but by provision of law. It is an interest which the law casts upon her.

F.S.A., 731. 34.

Smith v. Hines, 10 Fla. 258.

Finlayson v. Love, 44 Fla. 551, 33 So. 306.

Catlett v. Chestnut, 100 Fla. 1146, 131 So. 120.

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Under Florida law dower rights are extinguished by divorce decree at the instance of either party. Consequently the wife has the constitutional right of due process of law in any proceeding by which she may be divested of those rights.

North v. Ringlind, 149 Fla. 739, 7 So. 2d 476.

The two jurisdictional issues in suits for divorce in Florida are (1) residence for three months, and (2) sufficient allegations of the statutory grounds for divorce. Absence of either of these grounds is fatal to jurisdiction.

Chisholm v. Chisholm, 98 Fla. 1196, 125 So. 694.

Jurisdiction cannot be acquired by agreement nor assumed by a decree pro confesso.

Phillips v. Phillips, 146 Fla. 311, 1 So. 2d 186.

Kutner v. Kutner, 159 Fla. 870, 33 So. 2d 42.

As a citizen and resident of the State of Florida, petitioner takes the position that the courts of the state could not, through the bogus claim of comity, approve and hold valid a Cuban divorce which is in complete conflict with the laws of Florida and the public policy of the state as declared by the law of the land and the judicial decrees of the supreme court of the state construing her rights thereunder.

The Supreme Court of Florida from time to time over the years has consistently held that a foreign divorce is

entitled to be enforced in this state through comity only when it appears that the law, policy, or morals of the state have not been violated and *it is based on a ground valid in this state.*

Herron v. Passailaigue, 92 Fla. 818, 110 So. 539.

Bagwell v. Bagwell, 153 Fla. 471, 14 So. 2d 841.

Ogden v. Ogden, 159 Fla. 604, 33 So. 2d 870.

And it has likewise held over the years that a divorce decree in a state where the plaintiff is domiciled but the defendant is not, is not entitled to full faith and credit unless *defendant is personally served or appears.*

Beckwith v. Bailey, 119 Fla. 316, 161 So. 576.

In order for a judgment of a foreign court to be applied under the law of comity, it must appear that there has been an opportunity for full and fair trial, after due citation or voluntary appearance of the defendant, and an impartial administration of justice between the citizens of its country and those of other countries, and that there is no prejudice in the court or in the systems of laws under which it is sitting or fraud in procuring the judgment.

Warren v. Warren, 73 Fla. 764, 75 So. 35.

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The Cuban divorce decree violated the requirement of the law of domicile or residence at the divorce forum, ignored the ground of divorce recognized under the laws of Florida, resulted from lack of due process and from perjured testimony, thereby causing the court to become an instrument of fraud in divesting property rights of petitioner, and prevented an impartial administration of justice. Said decree violated the public policy of the State of Florida, and the actions of the Circuit Court of Dade County and the Supreme Court of Florida validating said decree should be declared null and void. Furthermore, the Supreme Court of Florida erroneously applied the principles of law set forth in the case of ESTIN v. ESTIN to the facts of this case and to section 65.04, Florida Statutes Annotated.

On the foregoing grounds it is respectfully contended that a writ of certiorari should be directed to the Supreme Court of Florida, in order that the errors complained of may be reviewed and corrected.

This 18th day of September, 1950.

W. G. WARD,
1229 Alfred I. duPont Building,
Miami 32, Florida

D. H. REDFEARN
R. H. FERRELL,
1522 Alfred I. duPont Building,
Miami 32, Florida.

APPENDIX

Sections of Florida Statutes, Annotated

65.04 Grounds for divorce

No divorce shall be granted unless one of the following facts shall appear:

(1) That the parties are within the degrees prohibited by law.

(2) That the defendant is naturally impotent.

(3) That the defendant is guilty of adultery.

If it shall appear to the court that the adultery complained of was occasioned by collusion of the parties, and done with the intent to procure a divorce, or that both parties have been guilty of adultery, no divorce shall be decreed.

(4) Extreme cruelty by defendant to complainant.

(5) Habitual indulgence by defendant in violent and ungovernable temper.

(6) Habitual intemperance of defendant.

(7) Willful, obstinate and continued desertion of complainant by defendant for one year.

(8) That the defendant has obtained a divorce from the complainant in any other state or country.

(9) That either party had a husband or wife living at the time of the marriage sought to be annulled.

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65.05 Effect of decree of divorce on children

No decree of divorce shall render illegitimate the children born during the marriage, except when it is rendered upon the ground set forth in paragraph nine of Section 65.04, in which case the marriage shall be invalid from the beginning and the issue illegitimate and subject to all the legal disabilities of such issue.

65.06 Proceedings against non-resident defendants

Bills for divorce may be brought against defendants residing out of the state, and service shall be effected upon them as in other cases in chancery.

65.07 Alimony pendente lite

In every suit by a wife for a divorce founded upon any of the grounds mentioned in Section 65.04, she may in the bill for divorce, or by petition, claim alimony and suit money, and, if the bill seems well founded, the court shall allow a reasonable sum therefor. Or if a wife defendant in any suit for divorce shall in her answer, or by petition, claim alimony or suit money, and the answer or petition shall seem well founded, the court shall allow a reasonable sum therefor.

65.08 Alimony upon decree of divorce

In every decree of divorce in a suit by the wife, the court shall make such orders touching the maintenance, alimony and suit money of the wife, or any allowance to be made to her, and if any, the security to be given for the same, as from the circumstances of the parties and

nature of the case may be fit, equitable and just; but no alimony shall be granted to an adulterous wife. In any award of permanent alimony the court shall have jurisdiction to order periodic payments or payment in a lump sum.

65.09 Alimony unconnected with divorce

If any of the causes of divorce set forth in Section 65.04 shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce upon bill filed and suit prosecuted as in other chancery causes; and the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife.

65.10 Alimony unconnected with causes of divorce

If any husband having ability to maintain or contribute to the maintenance of his wife or minor children shall fail to do so, the wife, living with him or living apart from him through his fault, may obtain such maintenance or contribution upon bill filed and suit prosecuted as in other chancery causes; and the court shall make such orders as may be necessary to secure to her such maintenance or contribution.

65.11 Effect of decree of alimony

A decree of alimony granted under Section 65.08 and Section 65.09 shall release the wife from the control of her husband, and she may use her alimony, and acquire, use and dispose of other property, uncontrolled by her

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husband; and when the husband is about to remove himself or his property out of the state, or fraudulently convey or conceal it, the court may award a ne exeat or injunction against him or his property, and make such order or decree as will secure the wife's alimony to her.

731.34 Dower in realty and personalty

Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her husband, or both, she may elect in the manner provided by law to take dower, which dower shall be one-third part in fee simple of the real property which was owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death, and in all cases the widow's dower shall be free from liability for all debts of the decedent and all costs, charges and expenses of administration, but her dower shall be ratably liable with the remainder of the estate for its proportionate share of the estate and inheritance taxes due by the estate of her deceased husband; provided, that nothing herein contained shall be construed as impairing the validity of the lien of any duly recorded mortgage or the lien of any person in possession of personal property. The homestead shall not be included in the property subject to dower but shall descend as otherwise provided by law for the descent of homesteads.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 325.

ANNIE HAHR PAWLEY, PETITIONER,

VS.

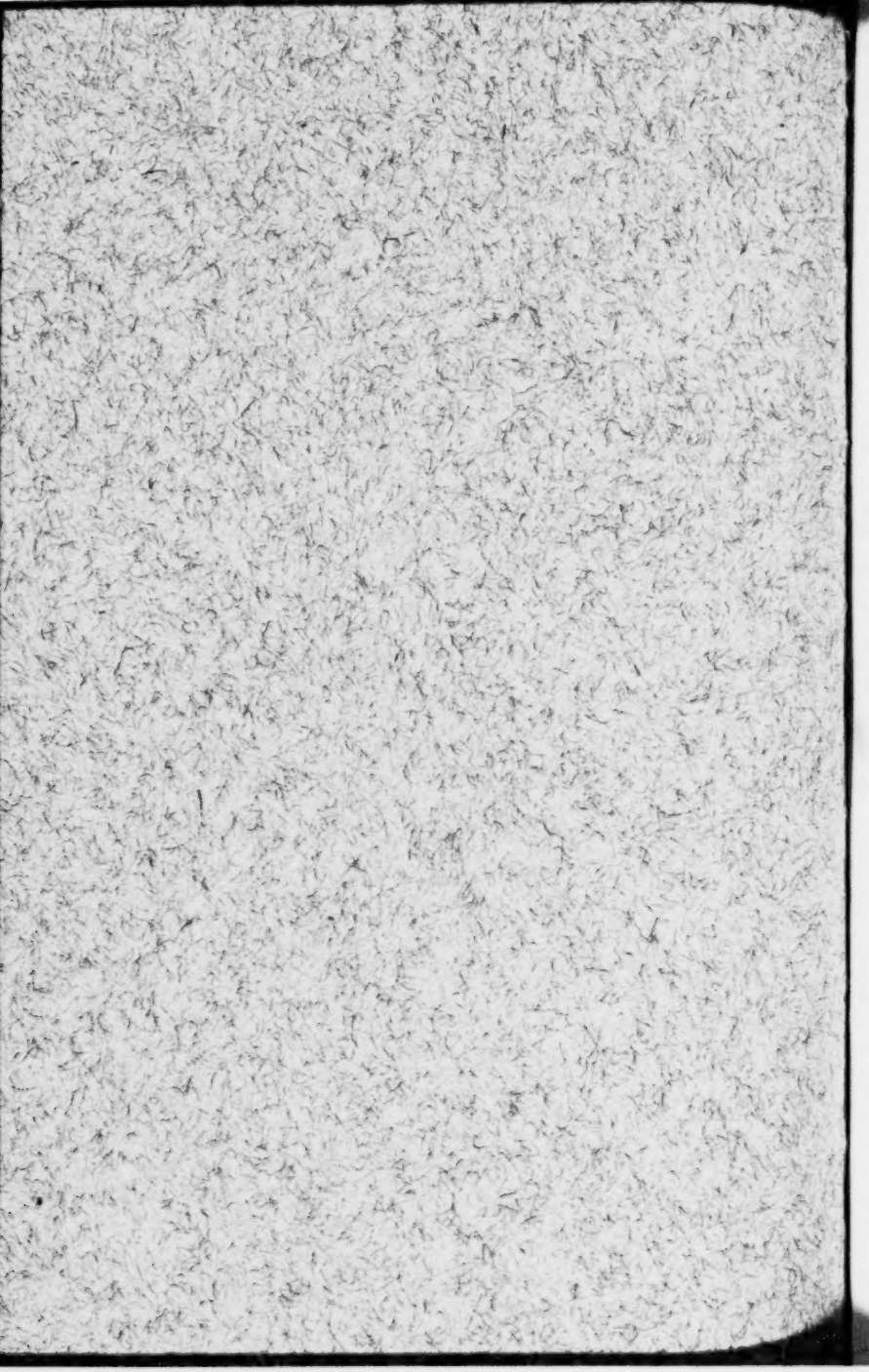
WILLIAM D. PAWLEY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF IN OPPOSITION TO CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 325.

ANNIE HAHR PAWLEY, PETITIONER,

VS.

WILLIAM D. PAWLEY, RESPONDENT.

BRIEF IN OPPOSITION TO CERTIORARI.

The bare bones of this case are these:

The petitioner, Annie Hahr Pawley, filed a bill in the Circuit Court of Dade County, Florida, against William D. Pawley, respondent, seeking alimony unconnected with causes of divorce under the provisions of Section 65.10, Florida Statutes, 1941[1] (R. 1-9).[2] To meet the require-

[1]"65.10 *Alimony unconnected with causes of divorce.*—If any husband having ability to maintain or contribute to the maintenance of his wife or minor children shall fail to do so, the wife, living with him or living apart from him through his fault, may obtain such maintenance or contribution upon bill filed and suit prosecuted as in other chancery causes; and the court shall make such orders as may be necessary to secure to her such maintenance or contribution."

[2]The transcript references are to the printed record. In every case emphasis is supplied unless otherwise indicated.

ments of the statute under which she proceeded she alleged that the defendant was her husband, that he had the ability to maintain her and his minor children, and had failed to do so.

Pawley's defense was twofold: (1) That he was not the plaintiff's husband, having been divorced from her by the decree of a Cuban court; (2) that it was not true that he had failed to support her; on the contrary, he had contributed to her, over the last five years,[3] almost $150,000.00, or approximately $30,000.00 a year (R. 9-22). He also claimed laches.

The plaintiff challenged the validity of the Cuban decree of divorce, the *bona fides* of Pawley's residence in Cuba, and the jurisdiction of the Court to enter it (R. 24).

The Chancellor found for Pawley on all issues (R. 494-504). He held that Pawley was a legal resident of Cuba, that the Court had jurisdiction, that it had proceeded in accordance with due process, and that the decree was entitled to recognition under rules of comity (R. 502-503). He also held that Pawley had contributed adequately to the support of his former wife (R. 503). He held, furthermore, that Pawley had remarried upon the faith of the validity of the Cuban decree of divorce and was living with his second wife, and that his former wife, the plaintiff, had full knowledge of the entry of the Cuban decree and for more than three years had failed to take any action to contest it, which barred her from obtaining relief (R. 503). Accordingly, the Chancellor dismissed the bill although he taxed the costs against Pawley (R. 503-504).

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[3]Commencing at about the time the Cuban proceedings were instituted and continuing until the time of the filing of the answer in this case.

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The petitioner appealed to the Florida Supreme Court. After full hearing that Court held, under the authority of the Estin case,[4] that the Cuban decree of divorce was divisible: (a) It was a valid dissolution of the bonds of matrimony; (b) but it did not operate to destroy Pawley's obligation to support his former wife, as no such question was before the Cuban court. The Chancellor's decree accordingly was affirmed in part and reversed in part. The Cuban decree of divorce was held to be entitled to recognition under rules of comity. It did not preclude the petitioner from enforcing her right to support from her former husband whenever he failed to recognize his obligation to do so (R. 539). But inasmuch as the evidence showed that he had "contributed adequately—if not lavishly," to her support, the evidence justified, yea required, the dismissal of her bill (R. 532).

When consideration is given to the fact that the statute under which the petitioner was proceeding cast upon her the burden of proving not only that Pawley was her husband but that, having ability to maintain her, he had failed to do so, which she utterly failed to sustain, the bill was properly dismissed *whether the Cuban divorce was valid or not.*

It is difficult to see what Federal question is presented.

PETITIONER'S INCHOATE DOWER RIGHTS WERE NOT PROTECTED BY THE FEDERAL CONSTITUTION.

The Cuban decree of divorce was not entitled to full faith and credit under the Federal Constitution. This has been expressly so held by the Florida Supreme Court with

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[4]334 U. S. 541.

reference to Cuban decrees and the respondent has never contended otherwise (R. 75).

Parker v. *Parker*, (1945) 155 Fla. 635, 21 So. 2d 141.

And whether or not the courts of a state should recognize the judgment of a court of a foreign nation on principles of comity is a matter within their sole and exclusive jurisdiction.

Lynde v. *Lynde*, (1901) 181 U. S. 183.

Allen v. *Alleghany Company*, (1905) 196 U. S. 458.

The basis of petitioner's claim seems to be that the judgment of the Florida courts upholding the validity of the Cuban divorce decree had the effect of depriving her of her inchoate right of dower in violation of the due process clause.

Florida long ago held that the Legislature could take away the husband's common law right of curtesy and did do so *by implication* in passing a statute of distribution making him his wife's heir.

Herzog v. *Trust Company of Easton*, (1914) 67 Fla. 54, 64 So. 426.

In the absence of a statute saving the wife's right of dower, a divorce decree terminates it and is a complete defense to any claim therefor after the husband's death.

North v. *Ringling*, (1942) 149 Fla. 739, 7 So. 2d 476.

Dower has always been a creature of statute and the right to collect it accrues only on the death of the husband if the marriage is valid and existing at that time.

Bennett v. *Bennett*, (1946) 157 Fla. 627, 26 So. 2d 650.

Bowler v. *Bowler*, (1947) 159 Fla. 447, 31 So. 2d 751.

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Dower is not a privilege nor an immunity of citizenship within the meaning of the Privileges and Immunities Clause or the Fourteenth Amendment and neither provision of the Constitution takes from the states the power to regulate the subject.

Ferry v. *Spokane P. & S. R. Company,* (1922) 258 U. S. 314.

Since the wife's right of dower is not a vested one, it is not protected from legislative impairment or destruction by the constitutional guarantees for the protection of property.

Randall v. *Keiger,* (1874) 23 Wall. 137.

In the case of *Merrill* v. *Fahs,* (1943) 51 F. Supp. 120, the District Court of the Southern District of Florida held that an antenuptial trust agreement based upon the release of dower rights was supported by a sufficient consideration and was not a taxable gift within the meaning of the Internal Revenue Act. The Court of Appeals for the Fifth Circuit reversed, saying:

> "* * * Merrill's expectancy of life was 18 or 19 years, and no actuary could foretell what personal property he would have at the end of that time, if any. His present personal wealth he might lose in his business or otherwise. As against the dower right he might give it away to his children, or freely dispose of it to suit himself in his lifetime. *Smith* v. *Hines,* 10 Fla. 258. It is hard to see where Merrill received any consideration on this item, since he could use and dispose of his personal property, except by will, without his wife's approval or consent. But her right in personal property, such as it was, was also subject to change by the legislature, and it so happens that the law was altered on April 21, 1939, while this transfer was in the making, so that the dower right was made subject to the husband's debts at death and to estate taxes. Laws of 1939, p. 16, Chap. 18999, F. S.

> A., Sec. 731.34. Again no actuary could estimate what Merrill's debts might be eighteen years hence. And yet further, the peculiar dower in personal property in Florida would be lost on Merrill's removal to a State which had no such law, for the law of the decedent's domicile governs the descent and distribution of movables. 15 C. J. S., Conflict of Laws, Sec. 18, p. 935. Merrill has already changed his domicile to New York. We see no way to arrive at the money value in 1939 of her prospective dower in personalty under the Florida law, except by the wildest guess." 142 F. 2d 651.

The judgment of the Court of Appeals for the Fifth Circuit was affirmed by this Court, 324 U. S. 308, and a rehearing was denied. *Ibid.* 888.

The case of *Adams* v. *Adams,* (1941) 147 Fla. 267, 2 So. 2d 855, would seem to be controlling. In that case the Florida Legislature passed an Act that affected an existing testamentary trust by limiting the dower rights of the widow to a child's share where the decedent was survived by lineal descendants by a former spouse. In an attack on the statute as unconstitutional, the Florida court squarely held that dower was not a "vested right" nor a "privilege" nor an "immunity" protected by the Constitution and that the Act did not deny the equal protection of the laws nor deprive the widow of her property without due process of law in violation of State and Federal constitutional provisions. An appeal to this Court was dismissed *as involving no substantial Federal question.* 314 U. S. 572.

To like effect see *Leffler* v. *Leffler,* (1942) 151 Fla. 455, 10 So. 2d 799.

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THE FACTUAL ALLEGATIONS OF THE PETITION ARE INACCURATE AND INCOMPLETE.

While we doubt that it is the function of a brief in opposition to the issuance of the Writ of Certiorari to engage in a factual controversy, some statements made in support of the application for the Writ are for the obvious purpose of prejudicing the Court and therefore we shall briefly deal with them.

Pawley at all times was and is a citizen of the United States. He never pretended to be a Cuban citizen. He was born in South Carolina, moved to Cuba when he was a small boy and grew up there. He learned to speak the language like a native and became thoroughly familiar with the country. Two of his younger brothers were born there. His schoolmates thought he was a Cuban and nicknamed him "Cuba." He married the petitioner in Georgia in 1919. At that time he was living in Haiti where he went with his bride. Afterwards, they moved to Georgia and lived with her people for a short period. From there he went to New York, Canada and Delaware on various business ventures. In 1925, at the suggestion of his mother-in-law, he went to Miami during the Florida boom. *He had never set foot there before in his life.* He made money in the boom and lost it in the collapse and in 1929 was broke and looking for a job. Because of his familiarity with the country and the fluency with which he spoke the language, the Curtiss-Wright Company sent him to Havana to operate the Cuban National Aviation Company. He lived there with his family until 1932 when the company was sold to Pan American Airways.

Assuming that he established residence in Miami in 1925, he clearly abandoned it in 1929 and re-established his Cuban residence. When the Cuban company was sold,

his employers sent him to the Far East. Not knowing whether he was going to live there a month or ten years, on his way to China (R. 177) he left his wife and small children with her people in Miami (R. 79). After he got to China, he found opportunities for success were unusual. He tried repeatedly to get his wife to join him and live there with him, but she refused. These are the findings of the Master (R. 60-65). On this evidence, the state court found that she had deserted him (R. 494-504).

Was the petitioner's conduct such as gave Pawley the right *to inquire of a court* if he were entitled to a divorce? The affirmative answer to this question is fatal to the petitioner's case. If so, to what court should he turn? He was not a Chinaman, and the American courts in China were not functioning on account of the war—even if they could grant relief. He abandoned the Florida residence that he maintained during the boom from 1925 to 1929 and had not lived there since so he could not ask Florida courts for relief. Cuba was the last place where he lived with any intention of remaining permanently, and there he went.

The Cuban attorney employed by him to bring the divorce proceedings advised him to remain for the period of thirty days so that there would be no question about the period of his residence, and on this advice he acted. His residence there was sufficient without the thirty days (R. 237-8).

He left no home in Florida to sojourn in Cuba. He procured no American passport for this purpose. Mr. Pawley was on a Presidential mission of grave importance. At all times he carried a passport with him that entitled him to go anywhere.

The Cuban court issued process to Mrs. Pawley in the fall of 1942 and the Judge transmitted it with a copy of

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the complaint to the Circuit Judge in Miami with the request that it be served in accordance with Florida laws. One of the Florida Judges issued written directions to the Sheriff to serve the summons and complaint on Mrs. Pawley in accordance with the Florida practice. The Deputy who made the service testified that she threw the papers in the street (R. 317-9) and she admitted that she had been advised by counsel to ignore them (R. 190). The Sheriff made the conventional return on the summons and thereafter Pawley's Cuban lawyer had another service made in like manner which was also ignored (R. 319). It is not contended that this service on Mrs. Pawley was sufficient to form the basis of a personal judgment against her but only that it gave her full notice of the institution of the suit and adequate opportunity to defend it. The Cuban divorce suit was not rushed through but was pending from the fall of 1942 to May of 1943 when a final decree was rendered, notice of which was likewise served on Mrs. Pawley in accordance with the Cuban practice (R. 263). The Cuban attorney who handled the case testified that the proceedings were in full conformity with the laws of Cuba (R. 251-3), and an English translation of the Cuban divorce law as well as an exemplified copy of the decree and a translation thereof were put in evidence. There was no proof offered to the contrary.

In many respects, the Cuban divorce law is similar to that of Florida and some of the grounds are identical, as are other features of their procedure. It is argued that Pawley did not sign the bill and was not in Cuba when it was filed, but it is not necessary under Florida practice for the plaintiff to sign a complaint for divorce nor to be physically present in the jurisdiction at the time of filing. It is also argued that he did not testify in the case and was not present when the decree was signed. Again, it is not

necessary that the plaintiff in a divorce case in Florida testify although it is customary. Nor is it necessary that he be within the jurisdiction when the decree is entered. Indeed, many times he is not.

In determining whether a foreign decree is entitled to recognition under principles of comity, the court in which the decree is challenged will not inquire into procedural methods which vary in different countries, yea in different states, or into such matters as credibility of witnesses, weight of evidence, etc., if it is satisfied that the foreign court had jurisdiction and an opportunity was given for fair trial under a system of jurisprudence likely to secure an impartial administration of justice between its residents and those of other countries and there is no prejudice in the court or the system of law under which it is sitting or any fraud in procuring the decree.

Parker v. *Parker, supra.*

Hilton v. *Guyot,* (1895) 159 U. S. 113.

There is not a word in the record to support counsel's statement that the testimony in the Cuban case was false. Even if it were, which we stoutly deny, that would afford no grounds for a review by this Court. The Cuban court was satisfied with it and the Florida courts, two of them, were satisfied with it.

In this day and age when friendly relations with Latin American countries are being stimulated by all, it is hardly consistent to say that we will not recognize the validity of their judicial proceedings on principles of international comity.

We will not dignify by answer the arguments about Pawley's second marriage to his secretary alleged to have taken place in six weeks. If the Cuban decree of divorce was valid, he had a right to remarry. Such questions can

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be injected into the record for only one purpose. The same is true about his service as Ambassador to Peru and Brazil and his manner of living while he performed with credit those offices. The scale upon which Ambassadors to foreign countries are required to live is too well-known to need comment from us *and likewise presents no Federal question.*

The same is true with reference to the arguments about his leaving the wife who bore his children in dire straits, etc. The Chancellor found that he contributed approximately $170,000 to her for the years 1942 to 1947, inclusive, and the Florida Supreme Court has held that if he fails to contribute to her in the future, the doors of the Florida courts are still open to her.

WHAT WAS NECESSARY FOR PETITIONER TO BECOME VESTED WITH DOWER RIGHTS?

Dower in Florida consists of one-third of the real estate owned by the husband at the time of his death or which he had conveyed without the relinquishment of his wife's rights and one-third of the personal property owned at the time of his death (Sec. 731.34, Florida Statutes). There is no showing that Pawley owned any real estate in Florida except the Prairie Avenue and Pine Tree Drive houses the title to both of which was vested in him and his wife as an estate by the entireties[3] (R. 238). Therefore,

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[3]Of course, petitioner would not be dowable in these. The entire estate would vest in the survivor upon the death of either co-owner. The property would be inalienable during the joint lives of the owners, except by joint conveyance, and upon divorce they would become equal joint tenants, an interest which would exceed dower.

in order for her inchoate right of dower ever to become vested, the following occurrences, as a minimum, would have to take place:

1. Pawley would have to die first.
2. They would have to still be married at the time of his death as a divorce at the instance of either would have prevented the dower right from vesting.
3. He would have had to be living in Florida as a permanent resident at the time of his death or in some other state that had similar statutory provisions for dower.
4. He would have had to own real estate at the time of his death or have owned it prior thereto and conveyed it without her relinquishing her dower and he would have had to own personal property.
5. If he was a resident of Florida or of a state having similar statutes, he must have failed to make a satisfactory provision for his widow by will.

These and other possibilities of extinguishing the inchoate right impelled the Court of Appeals for the Fifth Circuit to conclude that it was so vague that it would not supply the consideration of an antenuptial contract.

Fahs v. *Merrill, supra.*

Indeed, before the husband's death the wife can bring no action to recover dower or to preserve or protect her inchoate rights of dower.

Mayer v. *Reinecke*, (1942) (C. C. A. 7) 130 F. 2d 350, cert. den. 317 U. S. 684.

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THE MARITAL CONTRACT IS NOT WITHIN THE PURVIEW OF THE FEDERAL CONSTITUTION.

In a nebulous way the petitioner suggests that she "has been deprived of her marital contract" by (*sic*) the due process of law accorded her by the Fifth and Fourteenth Amendments of the constitution.

As the Fifth Amendment on its face restrains national action only—unless by the impact of the Fourteenth—it operates on state action also. Some difficulty is encountered in determining how the action of the Florida courts offends it. Howbeit, the language of Chief Justice Marshall in the *Dartmouth College case* (4 Wheat. 518) would seem to settle it:

> "* * * The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional."

See also *Maynard* v. *Hill*, (1888) 125 U. S. 190.
Hunt v. *Hunt*, (1879) 131 U. S. Append. clxv.

It has generally been considered by the courts of this country, Federal and State, that marriage, though in some respects a contract, is not within the constitutional inter-

diction of legislative acts impairing the obligation of contracts.

Cabell v. *Cabell's Adm'r,* (1858) 58 Ky. (1 Metc.) 319.

Livingston v. *Livingston,* (1903) 173 N. Y. 377, 66 N. E. 123, 93 Am. St. Rep. 600, 61 L. R. A. 800.

White v. *White,* (1849) 5 Barb. (N. Y.) 474, 4 Howard's Pract. 102.

Rugh v. *Ottenheimer,* (1877) 6 Ore. 231, 25 Am. Rep. 513, 38 Pac. St. Rep. 231.

State v. *Tutty,* (1890) 41 F. 753, 7 L. R. A. 50.

CONCLUSION.

Let us recapitulate. Mrs. Pawley's bill sought separate maintenance only. She claimed that Pawley was her husband. She did not mention the Cuban divorce. She did not ask for dower. She did not ask for a division of the property or an allocation to her of any part of it. She sought alimony pure and simple.

The Court said that she was not entitled to maintain her bill not only because it recognized the validity of the Cuban decree of divorce but also because Pawley had been supporting her adequately.

The doors of the Court were not closed upon her. On the contrary, she was told expressly and clearly by the Florida Supreme Court that while the proceedings in the Cuban courts brought by Pawley and culminating in a decree of divorce were recognized as a valid dissolution of the bonds of matrimony, they did not discharge his obligation to support her, and while he was performing it at this time, nevertheless if he should cease to do so she was invited to come back and make her complaint

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with the assurance that the doors of the Court would be open when she approached.

We respectfully submit that no right secured to her by the Federal Constitution has been infringed and that the petition should be denied.

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